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In the Supreme Court of the United States

OCTOBER TERM, 1977

ALTON BOX BOARD COMPANY, ET AL.,
AND RICHARD ELDH, PETITIONERS

v.

UNITED STATES OF AMERICA

IN RE FOLDING CARTON ANTITRUST LITIGATION
(M.D.L. 250)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) and the order of the district court (Pet. App. B1-B5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1977. A petition for rehearing and suggestion of rehearing *en banc* was denied on February 22, 1978. The petition for a writ of certiorari was filed on March 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in allowing a civil plaintiff to use the grand jury testimony of corporate employees to impeach, test the credibility of, or refresh the recollection of those employees as witnesses when the grand jury testimony to be disclosed had already been disclosed to one or more of the defendants.

STATUTE AND RULES INVOLVED

The Jencks Act, 18 U.S.C. 3500(a), provides in part:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

Rule 6(e) of the Federal Rules of Criminal Procedure provides in part:

> (1) *General rule.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

> (2) *Exceptions.*-
>
> * * * * *
>
> (C) Disclosures othewise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding * * *

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides in part:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government * * * Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

STATEMENT

In August 1974 the United States began a grand jury investigation in the Northern District of Illinois into allegations of price fixing by the manufacturers of

paperboard folding cartons. Most of the witnesses who testified before the grand jury were present or former employees of the prospective defendant companies. As is often the case in such investigations, corporate defense counsel debriefed witnesses following their grand jury testimony so that defense counsel could chart the course of the investigation and prepare future witnesses. Transcript of Proceedings Before Judge Will, June 24, 1977, pages 50-51, 63-64 (hereinafter "Transcript"). When an employee of one company testifying before the grand jury incriminated another company or its officers, defense counsel would provide that information to counsel for the company or individual implicated.[1]

The grand jury ultimately indicted twenty-three corporations and fifty individuals, officers of the defendant corporations, for their participation in a nation-wide conspiracy to fix the prices of folding cartons through bid-rigging, secret information exchanges, and by other means. Following indictment, defendant Weyerhaeuser Corp. inspected all of the testimony available to it under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure and exculpatory material under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. Three individual defendants through counsel also inspected *Brady* material.

After initially entering pleas of not guilty, twenty-two of the corporate and forty-eight of the individual defendants changed their pleas to *nolo contendere*. Chief

[1]Thus, defendant Burt Co. said in an interrogatory answer that its counsel received "privileged communications with counsel for other defendants herein" in which they "were orally advised in a fragmentary manner by certain counsel for other defendants herein whether or not Burt was mentioned in certain testimony and, if so, the possible reference." Defendant F.N. Burt's Responses to Plaintiffs' First Consolidated Set of Interrogatories, October 15, 1976, Response to Interrogatory Number 4.

Judge Parsons entered pleas of guilty and undertook sentencing. The other three defendants went to trial.[2]

Sentencing of those pleading *nolo contendere* proceeded without pre-sentencing probation office reports as provided in Rule 32(c), Fed. R. Crim. P. The court relied on statements by each defendant and the government and presentations by each at *in camera*[3] hearings for each defendant. Transcript, pages 45-46. The government's statements summarized each defendant's involvement in the conspiracy. Transcript, pages 18-20. All of the defendants and their counsel heard the government's oral presentation of the contents of these statements at the sentencing hearings (Transcript, pages 45, 48), and thirty-five of the defendants, two corporations and thirty-three individuals, inspected the government's prepared statements of their participation. Government's Log of Grand Jury Transcript Quoted in Government's Statements Seen by Defense Counsel, pages 2-5. The material disclosed to the individual defendants in these statements frequently included grand jury testimony of subordinate employees of the corporate defendant which employed the individual defendant. *Ibid.;* Government's Log of Grand Jury Transcript Inspected by Defendants, pages 2-4 (identifying employers of grand jury witnesses).

The remainder of the disclosures of grand jury material which are at issue here occurred in the course of the trial of the three defendants who pleaded not guilty. Those

[2]The corporate defendant, Consolidated Packaging Corp., was convicted and its conviction was affirmed by the Seventh Circuit. *United States* v. *Consolidated Packing Corp.*, No. 77-1422, decided April 13, 1978. The two individual defendants were acquitted.

[3]Judge Parsons impounded the government's statements and held the sentencing hearings *in camera* to protect the rights of the defendants who had chosen to go to trial but whose trial had not yet been completed.

defendants, Consolidated Packaging Corp., one of its vice presidents, and an official of International Paper Co., made extensive examinations under the Jencks Act, 18 U.S.C. 3500(a), of grand jury testimony of the fourteen grand jury witnesses the government expected to call as trial witnesses, of exculpatory material under *Brady* v. *Maryland, supra*, and of other material submitted in lieu of a bill of particulars. Pet. 7; Government's Log of Grand Jury Transcript Inspected by Defendants, pp. 3-7. Here, too, some of the disclosures of the grand jury testimony were made to the senior officials of the companies which employed the grand jury witnesses.

Following commencement of the government's prosecution, private parties filed more than seventy-five treble damage suits, paralleling the government's criminal charges, against the corporate criminal defendants and at least three other corporations. These actions were consolidated under the rules regulating multi-district litigation. Plaintiffs, indicating that they intended to depose the grand jury witnesses or call them as trial witnesses, sought an order from the presiding judge, Judge Will, requiring the United States to produce grand jury testimony previously disclosed to any defendant in the criminal action and the pre-sentencing Statements in Aggravation made available to defendants. Memorandum in Support of Plaintiffs' Proposed Pretrial Order No. 14 Requiring Production of Grand Jury Materials, May 5, 1977, p. 6 filed in *In Re Folding Carton Antitrust Litigation,* Master File No. MDL 250. Judge Will referred the motion to Judge Parsons. Contemporaneously, the attorneys handling the government's criminal case moved Judge Parsons to lift his order impounding the pre-sentencing statements. Judge Parsons delegated his authority to act on both that motion and the motion for an order compelling disclosure of the grand jury transcripts to Judges Robson and Will, who were jointly presiding over the multi-district litigation.

After holding extensive hearings, the district court panel issued the order as to which review is sought. It allows counsel for plaintiffs to inspect and copy the grand jury material disclosed to any defendant, subject to strict limitations on the use of the material. The material is to be released only to the coordinating secretary for each side's executive committee, and each is to keep a log of counsel who make copies and what material is copied. The material is to be used only in the civil case, and "only for the purposes of impeachment of a witness, refreshing a witness' recollection as to matter to which he formerly testified, or testing a witness' credibility as to matters to which he formerly testified" (Pet. App. B4).

On appeal, the court of appeals said the test to be applied by the district court was whether the utility from disclosure to plaintiffs outweighed "any type of impairment to the policy of secrecy which can reasonably be anticipated under the circumstances" (Pet. App. A4). And it held that, under the circumstances of this case, the district court did not abuse its discretion in holding that the benefits of disclosure outweighed the slight prospect of injury to the policy of secrecy.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. Contrary to petitioner's contention (Pet. 12-14), the decision below does not conflict with *State of Texas* v. *United States Steel Corp.*, 546 F. 2d 626 (C.A. 5), certiorari denied, No. 76-1710, October 11, 1977.

In *State of Texas*, a federal grand jury indicted nine companies for price fixing and other violations of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1 and 2. All the defendants pleaded *nolo contendere.* During the criminal proceeding the corporate defendants

obtained the grand jury testimony of their employees pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The State of Texas filed a civil antitrust action against the same companies based upon the same conduct and sought the production of the employee grand jury testimony previously disclosed to the corporate defendants. The district court granted a motion to compel production and certified the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). *State of Texas, supra*, 546 F. 2d at 628.

The court of appeals reversed. It stated that "[t]he issue presented is whether the State of Texas must show a particularized need to obtain the grand jury documents from the defendants and, if so, whether it has made that showing in this case" (546 F. 2d at 628). It held that particularized need must be shown, and that Texas had not shown that need because

> [t]he general circumstance that another party has his own or his employees' transcript in his possession does not, standing alone, establish particularized need sufficient to overcome the need for grand jury secrecy. [*Id.* at 631.]

In the present case the court of appeals did not find that prior disclosure "standing alone" dispensed with the requirement of need. Rather, as in *State of Illinois* v. *Sabaugh*, 552 F. 2d 768 (C.A. 7), certiorari denied *sub. nom. J.L. Simmons Co.* v. *Illinois*, No. 76-1661, October 11, 1977, it deemed a particularized showing satisfied by plaintiffs' need to prepare for the testimony of witnesses at depositions or in trial. Here, the prior grand jury testimony may be used solely for impeachment, refreshment or testing the witness' credibility. In these limited circumstances, the court concluded that plaintiffs had a particularized need which outweighed the limited remaining interest in grand jury secrecy.

In arguing that there is a conflict between the decision below and that of the Fifth Circuit in *State of Texas*, petitioners ignore the critical fact that the Seventh Circuit permitted disclosure only because of the additional factor, not invoked in *State of Texas*, that the witnesses whose grand jury testimony was sought would be called to testify at trial or deposition. In contrast, the Fifth Circuit held only that the fact that the corporate defendants had copies of their employees' testimony was not enough to show particularized need. Nothing in the Fifth Circuit's decision indicates that if the additional factor had been presented to the Fifth Circuit, that court would have denied production.[4]

2. The decision below does not involve any novel holding or any departure from prior law, and does not open the grand jury door wider than the existing particularized need standard permits, given Rule 16(a)(1)(A). Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400. Since the secrecy required by Rule 6(e) protects the identity of witnesses testifying before the grand jury, civil antitrust plaintiffs ordinarily will have to decide whether to call such persons for trial or deposition without knowing whether they had been grand jury witnesses. Only then may their grand jury testimony, as previously furnished to the corporate defendants, become available under the decision below. It is settled that the grand jury testimony of trial witnesses (*United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682) and deponents (*Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (C.A. 2); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F.R.D. 37, 42 (N.D.

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[4]The Ninth Circuit's analysis of the *State of Texas* decision is to the same effect. See, *Petrol Stops Northwest* v. *United States*, 571 F. 2d 1127, 1130.

Ill.)) may be disclosed under the particularized need standard (cf. *Dennis* v. *United States*, 384 U.S. 855, 870, n. 15).

Petitioners appear to rely on the lack of formal disclosure pursuant to Rule 16(a)(1)(A) of employee grand jury testimony to the corporate employer (Pet. 13). The district court, however, properly declined to rely on such formalism. The existence of Rule 16(a)(1)(A) means that corporate employees who testify before a grand jury have every reason to believe that the party most able to retaliate for incriminating evidence, *State of Illinois* v. *Sarbaugh, supra*, 552 F. 2d at 775, will be able to inspect that testimony at some later date. In the present case, there had been considerable disclosure of prior grand jury testimony both to corporate employers and to superior employees. As a result, the district court properly exercised its discretion "in weighing the usefulness to plaintiffs of the material released against any type of impairment to the policy of secrecy which can reasonably be anticipated under the circumstances" (Pet. A-4). The lower courts applied the recognized legal standards and there is no occasion for this Court to consider the application of those principles to the particular facts here.

3. Petitioners' suggestion (Pet. 21) that permitting disclosure of grand jury testimony to others as a result of disclosure to the corporate defendant or its officers "abrogates" discovery rights under the Jencks Act, *Brady* v. *Maryland*, and Rules 16(a)(1)(A) and 32(c)(3)(A), is unpersuasive. Criminal defendants are often put to hard choices, but as this Court stated in *United States* v. *Nobles*, 422 U.S. 225, 241, the rights of the accused do not release it "from the legitimate demands of the adversarial system." The approach of the court of appeals provides adequate protection to the corporate defendants' interests. Use of grand jury testimony is

limited to situations where plaintiffs have shown compelling need and its use is limited to serving that need. There is nothing unfair in letting plaintiffs also obtain accurate relevant information already in the hands of their opponents. To the contrary, petitioners recognize "it is unfair to permit one side 'to have exclusive access to a storehouse of relevant fact' " (Pet. 15, quoting *Dennis* v. *United States*, 384 U.S. 855, 873).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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